

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

PARADISE INVESTMENT FUND, LLC,

Case No. 6:11-bk-13841-ABB
Chapter 11

Debtor.

PARADISE INVESTMENT FUND, LLC,

Plaintiff,

Adv. Pro. No. 6:12-ap-00083-ABB

vs.

SUNTRUST MORTGAGE, INC.,

Defendant.

ORDER

This matter came before the Court on the Motion to Dismiss Counterclaims (Doc. No. 26) filed by the Plaintiff/Debtor Paradise Investment Fund, LLC (“Paradise”). Defendant SunTrust Mortgage, Inc. (“SunTrust”) filed a response (Doc. No. 31). A hearing was held on July 11, 2012, at which counsel for Paradise and SunTrust appeared.

The motion is due to be denied. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Paradise filed a voluntary Chapter 11 petition on September 13, 2011. The last date for filing claims was January 16, 2012. SunTrust is pursuing several claims totaling

more than \$7.9 Million (claims 17, 18, 19, 20, 21, 22, and 25) that it filed on or before the bar date.¹ SunTrust's Proofs of Claim assert the loans it made to the Debtor are secured by mortgages on real properties.²

Paradise did not file objections to SunTrust's claims in the main case. It initiated this adversary proceeding on May 2, 2012. Paradise amended its complaint on July 17, 2012, in response to a motion to dismiss (Doc. No. 18). It seeks a declaratory judgment that the mortgages SunTrust recorded on six of Debtor's properties are invalid because they were executed by individual partners in Paradise — including Eric Waddell, the manager of WW&A, ("the Individuals") — but were not signed by WW&A, the sole managing entity of Paradise. Paradise seeks to avoid the mortgages and objects to SunTrust's claims 17, 18, 19, 20, 22 and 25. Paradise does not object to claim 21.

SunTrust answered the amended complaint on August 3, 2012, in a pleading that asserts fifteen counterclaims (Doc. No. 24). The counterclaims seek a declaration that the notes and mortgages identified in SunTrust's original claims and the amended complaint are enforceable against Paradise; or reformation of the mortgage documents to demonstrate the Individuals' signatures created secured obligations on behalf of Paradise; or imposition of equitable liens on the properties. SunTrust alleges breach of the implied covenant of good faith and fair dealing and agency authority of Eric Waddell to bind Paradise. Each of the counterclaims seeks to achieve the same result, a finding by this Court that SunTrust's original claims against the Debtor are secured by the mortgages executed by the Individuals.

¹ SunTrust withdrew Claims 23 and 24 as duplicative of other claims it filed in this case.

² The Proofs of Claim state three of the loans are undersecured; the value of the real property securing each of them is less than the indebtedness on that loan (Claims 21, 22, and 25).

Paradise moves to dismiss all but one of SunTrust's counterclaims on the grounds they are late-filed claims or improper claim amendments (Doc. No. 26).³

CONCLUSIONS OF LAW

SunTrust's counterclaims are claims against the Debtor's estate. See In re Control Center, L.L.C., 288 B.R. 269, 279-283 (M.D. Fla. 2002); see also In re EZ PAY Servs., Inc., 389 B.R. 278, 288, 290 (M.D. Fla. Bankr. 2008). The parties disagree whether they are distinct from those claims filed by SunTrust before the claims bar date. Paradise argues the counterclaims are either new and distinct claims that should be disallowed as late-filed or impermissible amendments to the original claims. SunTrust argues the counterclaims are not new claims as they do not seek any relief in addition to that requested in the original claims -- establishment of SunTrust's security interests in the real properties identified in those claims.

A claim is not new but rather is a permissible amendment to an existing claim "when the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity[,] or to plead a new theory of recovery on the facts set forth in the original claim." In re Marineland Ocean Resorts, Inc., 242 B.R. 748, 754 (M.D. Fla. Bankr. 1999) (citing United States v. Int'l Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir. 1985) (other citations omitted). Courts "liberally allow [such] amendments." Id.

"Similarly, amendment is freely permitted so long as the initial claim provides adequate notice of the existence and nature of the claim, as well as the creditor's intent to hold the estate liable." Id. (citing Unioil v. H.E. Elledge (In re Unioil, Inc.), 962 F.2d 988, 992 (10th Cir.1992)). "Likewise, to be within the scope of a permissible amendment,

³ Paradise answered Counterclaim XIV which seeks a declaratory judgment that Paradise is obligated to SunTrust in an amount in excess of \$4 Million.

the amended claim should not only be of the same nature as the original, but also reasonably within the amount to which the original claim provided notice.” Id. (citations omitted).

The counterclaims Paradise seeks to have dismissed are not new claims. They are permissible amendments to claims 17, 18, 19, 20, 22, and 25 by SunTrust. The counterclaims arise from the same transactions and occurrences as the original claims; they assert SunTrust loaned monies to Paradise secured by the properties identified in SunTrust’s original claims. The counterclaims seek the same outcome as the original claims, establishment that Paradise’s debts *in the same amount as the original claims* are secured *to the same extent asserted in the original claims*. The counterclaims merely assert additional legal theories — reformation and equitable liens — to support the secured status of the claims originally filed by SunTrust.

SunTrust’s original claims provided notice to all interested parties of SunTrust’s interest in the Debtor’s property. The counterclaims do not seek any additional property of the estate; they do not seek to increase the claim amount or change the secured status of SunTrust’s claims.

The Court notes, when considering the equities, Paradise did not file any written objection to SunTrust’s claims in the main case and filed its original adversary complaint after the claims bar date. The counterclaims are proper responses to the adversary complaint, Paradise’s first objection to SunTrust’s claims.

That the counterclaims were asserted in a pleading filed after the claims bar date is irrelevant. They are not late filed claims. They are permissible amendments to SunTrust’s original claims.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the motion to dismiss is
DENIED.

Dated this 4th day of December, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge